(3)

No. 91-649

IN THE

Supreme Court of the United States

October Term, 1991

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Petitioners,

against

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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(7274—LC5-81—1991)

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TABLE OF AUTHORITIES.

CASES:

Statement as to Corporate Parties.

No corporate party to this case has parents or subsidiaries.

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Errors in matters raised for the first time by respondents in their brief in opposition to the petition require a reply brief.

I.

The United States Supreme Court should determine whether the wrongful failure to issue a building permit violates a substantial federal constitutional right.

Respondents argue at pages 12 through 14 of their brief that the obstinate and wrongful failure of a local government to issue a building permit either does not deny a substantial right of the applicant or only denies a right enforceable exclusively in the state courts. This argument finds clear support in *PFZ Properties, Inc. v. Rodriguez*, 928 F2d 28 (1st Cir. 1991), cert. granted ____ US ____ (November 12, 1991).

On the other hand the respondents' position is clearly contrary to the view of the majority of the circuits and is directly contrary to the prior decision of the court of appeals in this case, *Greene v. Town of Blooming Grove*, 879 F2d 1061 (2d Cir. 1989).

An affirmance by this Court of *PFZ Properties* could possibly determine the outcome of this case. Absent such an affirmance the argument at pages 12 through 14 is only an attempt to relitigate respondents' prior defeat in the court of appeals. This case should not be disposed of while *PFZ Properties* is undecided.

II.

There is conflict among the circuits.

Respondents now argue that all Second Circuit cases on the question in this case are consistent. If this is true it only makes clearer the conflict between the Second and Eleventh Circuits discussed in the petition. It also implies that

the Second and Fifth Circuits are in conflict on the question of whether the same rules apply to the construction of civil and admiralty pleadings.

III.

The facts found by the jury are conclusive.

At pages 15 and 16 of their brief respondents now argue for the first time that although the jury found a vested right of petitioner to a 136 acre bungalow colony, it did not necessarily find a right to build 419 units. This is contrary to the district court's instruction to the jury. "The issue for you the jury to decide is whether by virtue of the law of vested nonconforming use, as I will explain it, the plaintiffs have a vested nonconforming use to build the additional 419 bungalows on the full 136 acres."

In furtherance of this argument respondents state, at page 2, that approval was not found in the Town's files for 469 units and the "existence of such an approved plan was not demonstrated by the petitioners." What was demonstrated by petitioners to the obvious satisfaction of the jury was the existence of an approved plan for a 136 acre bungalow colony. Petitioners have never claimed that they already have approval for 419 specific units or that they are exempt from complying with the usual requirements to obtain the 419 building permits. The jury found, despite the Town's denial, that the Town had approved a 136 acre bungalow colony and that petitioners' vested rights extended to the whole 136 acres. This finding leads to the legal conclusion that the subsequent abolition of bungalow colonies is ineffective as to those 136 acres. Petitioners agree that they have to comply with all other usual requirements for their building permits.

Although respondents were unsuccessful at the trial in attacking the adequacy of petitioners' sewers they now mention for the first time, at page 7 of their brief, an unadjudicated post trial citation against those sewers. Similarly, although the adequacy of the recreational facilities—as shown on the approved plan exhibited to the jury—was tried extensively, respondents now argue, for the first time, at page 7, that petitioners do not have an approved recreational plan. Respondents cannot now relitigate these issues.

IV.

Declaratory judgment was appropriate.

Respondents argue at pages 14 through 17 of their brief that declaratory judgment was premature. The New York cases cited by them do not stand for the proposition that zoning boards of appeal must always decide claims of vested rights in the first instance, only that such boards must decide such claims when properly put before them. Zoning boards of appeal, as a matter of grace, can permit the expansion of a vested non-conforming use. For obvious reasons New York law does not require that one seek leave to expand a vested non-conforming use if all one wants is judicial vindication of it as it has actually vested.

New York has various remedies for various wrongs. Some are administrative and some are outgrowths of the prior prerogative writs. In this case the remedy is declaratory judgment. This case is not at all like *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In that case Tennessee provided the developer and its successor bank with two administrative remedies: one was a precondition to the action complained of and the other was a monetary relief. Hamilton Bank was trying to

make an end run around both. Petitioners are merely seeking the remedy New York has provided for the wrong done to them. (Hamilton Bank would not even stand for the proposition that petitioners' claim under section 1983 was premature since it was based on a denial of procedural due process and not a taking without just compensation.)

CONCLUSION

A writ of certiorari should issue.

Dated: Glen Cove, New York
November 25, 1991

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